



The Extraordinary Chambers in the Courts of Cambodia and the Responsibility to Protect

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List of Acronyms and Terms

CPP	Cambodian People's Party
DK	Democratic Kampuchea (Pol Pot regime, 1975 – 1979)
ECCC	Extraordinary Chambers in the Courts of Cambodia
FUNCINPEC	<i>Front Uni National pour un Cambodge Indépendent, Neutre, Pacifique, et Coopératif</i> (National United Front for an Independent, Neutral, Peaceful, and Cooperative Cambodia), royalist political party in Cambodia
LICADHO	Ligue Cambodgienne pour la Promotion et la Défense des Droits de L'Homme (Cambodian League for the Promotion and Defense of Human Rights), human rights NGO in Cambodia
ICISS	International Commission on Intervention and State Sovereignty
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
PRK	People's Republic of Kampuchea (1979 – 1993)
R2P	Responsibility to Protect
SRP	Sam Rainsy Party
UNDP	United Nations Development Programme
UNTAC	United Nations Transitional Authority in Cambodia (1992 – 1993)



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1. Executive Summary

The Extraordinary Chambers in the Courts of Cambodia (ECCC) is a hybrid trial currently underway in Cambodia to try surviving senior leaders of the Khmer Rouge for their crimes from 1975 to 1979. This report looks at the positive impacts that the ECCC can have, as well as the problems that are currently holding it back in order to assess the potential impacts the trials may have for implementing the Responsibility to Protect (R2P) in Cambodia. Prevention has been identified as the most important aspect of the Responsibility to Protect and the ECCC can make a number of contributions to structural prevention in Cambodia. The progress of the ECCC is of great relevance to the Asia-Pacific Centre for the Responsibility to Protect because under Pillar I of R2P (the protection responsibilities of the State), the building of institutions, capacities and practices for the promotion and preservation of the rule of law is a necessary component for advancing R2P within individual states in the region. The international community's participation in the ECCC also falls under Pillar II, the responsibility of the international community to assist states in upholding their protection responsibilities.

This report therefore argues that despite the limitations of the ECCC, there are still a number of positive changes which the court can facilitate. It is important to realise that whilst the mere existence of the ECCC in Cambodia can have positive benefits, these can be enhanced through targeted programs and the court alone will not reform the entire Cambodian judiciary and government. The current state of the Cambodian justice system is deplorable; opposition leaders are frequently targeted through the courts, politically motivated crimes go un-investigated, and corruption is systematic. These judicial weaknesses greatly limit Cambodia's ability to fulfil its responsibilities to its own citizens under R2P. The ECCC can impact the judiciary through its training programs of Cambodian lawyers and judges and through demonstrating an international standard of justice. It can also bring a symbolic end to the impunity of the Khmer Rouge and has the potential to positively impact corruption. These achievements directly contribute to R2P structural prevention goals through the development of the rule of law and an independent judiciary. More broadly, the ECCC will also provide justice for the millions of victims of the Khmer Rouge, help to educate the next generation of Cambodians about their history, and contribute to the development of an international culture of impunity.

The ECCC has encountered many problems since its establishment, particularly regarding allegations of bias amongst international judges, corruption, political interference, poor human resource management, and limited outreach resources. Some of these problems have been sufficiently addressed whilst others, particularly corruption, continue. This report ends with recommendations for dealing with the issues that persist at the ECCC so that it can more effectively contribute to R2P structural prevention. Overall, the ECCC can bring many positive benefits to Cambodia but it is primarily a catalyst for further change, not a panacea.



2. Introduction

It has been thirty-one years since the Khmer Rouge government was ousted from power in Cambodia. Yet only in the last year has there been a legitimate trial of any senior leader of this regime responsible for the deaths of 1.7 million people. The Extraordinary Chambers in the Courts of Cambodia (ECCC) is the hybrid court in Cambodia, established by a 2003 agreement between the United Nations (UN) and the Cambodian government to try the ageing leaders of the Khmer Rouge. The negotiation process was torturous and many international commentators and NGOs doubted that a court would ever come into existence. Despite these early misgivings, however, the ECCC eventually became fully operational in 2007. Doubts continued over whether the court would be able to attract funding, successfully arrest suspects who could easily flee to Thailand, or hold a trial which met international standards. Despite these doubts, the ECCC has been sufficiently funded to continue its operations thus far, arrests were swift and uneventful, and the recently concluded trial of Duch, who was commander of a Phnom Penh prison and torture centre (S-21), has been widely acclaimed as meeting international fair trial standards.



A photo of one of the estimated 14,000 victims of S-21 (Tuol Sleng), a prison and interrogation centre during the Pol Pot regime.

Not all criticisms of the ECCC have proved to be unfounded. Due to domestic and international political factors, it was not until thirty years after the overthrow of the Khmer Rouge that the first trial began. This long delay has meant that many of the key leaders of the Khmer Rouge have died without being brought to trial, including the movement's leader, Pol Pot, who passed away in 1998.¹ Another criticism has been over the temporal jurisdiction of the ECCC which is strictly limited to the period of the Khmer Rouge's regime, Democratic Kampuchea (1975 – 1979), and so the court cannot investigate abuses during their rise to power or after their regime. Currently, there are only five suspects imprisoned and it is extremely unlikely that the ECCC will try more than ten people in total for the deaths of 1.7 million people. There is, therefore, good reason to consider the ECCC as too little too late. However, nothing can be done now to remove the intervening thirty years. The ECCC process of the ECCC is important in providing an explanation of the Democratic Kampuchea regime; many Cambodians consider the court's role in answering questions of why the Khmer Rouge acted as they did and in

acknowledging their suffering to be just as important as the judicial functions. It should also be remembered that the limited number of defendants at the ECCC in comparison with other international criminal justice mechanisms is in part due to the number of leaders of the Khmer Rouge who have died in the last thirty years but who would otherwise be facing charges.

The hybrid structure of the court, with the participation of both Cambodian and international judges and staff, has also attracted some criticisms. There are benefits to the hybrid structure which will be discussed in this report but there are also some sacrifices, not necessarily in standards of law but in a susceptibility to corruption and political control. There is little purpose in discussing altering the structure of the ECCC now that it has been established, or speculating on what could have been if a trial had been convened earlier. Instead, this report will address the benefits and weaknesses of the ECCC now and how the court as it currently exists can best be utilised.

In essence, there are two fundamental goals which the ECCC has the potential to achieve. The first is to apportion judgement on the crimes of former Khmer Rouge leaders. As Hannah Arendt argued in *Eichmann in Jerusalem* on the trial of one of the architects of the Holocaust some twenty years after the Second World War, 'Hence, to the question most commonly asked about the Eichmann trial: What good does it do?, there is but one possible answer: It will do justice'.² Essentially, a trial is still a trial and the heart of its purpose is to judge the guilt of the accused on the evidence presented, and to mete out punishment where appropriate. However, the ECCC also has the potential to achieve another, wider goal. Over the last two decades, with the advent of international trials, we have moved beyond the idea of trials being insulated from the surrounding society with a focus on a single isolated perpetrator. The rationale for trials of international crimes are now largely based on the additional impacts those trials can have on a society. Even if they cannot impact the crime which prompted the trial in the first place, they can help to prevent future mass atrocities from occurring.

The prevention of mass atrocities, such as those presided over by Pol Pot and the senior Khmer Rouge leaders, has become a priority of the international community since the humanitarian disasters seen during the breakup of the former Yugoslavia and the genocide in Rwanda during the mid-1990s. Over the last decade, the Responsibility to Protect (R2P) principle has been developing as the current international community's attempt to prevent the occurrence of genocide, war crimes, ethnic cleansing and crimes against humanity and to respond effectively when these crimes do occur. The original report of the International Commission on Intervention and State Sovereignty (ICISS), which set out the idea of the R2P, said that 'Prevention is the single most important dimension of the responsibility to protect'.³ One of the key aspects of this is structural prevention, which addresses the root causes of mass atrocity crimes. As this report highlights, there are direct impacts that the ECCC can have which will play a role in structural prevention in Cambodia. These impacts, discussed in the sections on Impacts of the ECCC on Cambodia's Judiciary and Government and Impacts beyond Cambodia's Judiciary in this report, include improving the judiciary through training programs and demonstrating standards of international justice, improving the rule of law by tackling the culture of impunity, and educating the next generation of Cambodians to break the cycle of violence. The ECCC can also contribute to a global culture of accountability which could help to deter future criminals. None of these results will be seen immediately, they are all long-term effects, and attributing any slight change in the Cambodian judiciary to the role of the ECCC would be misleading and premature. This report discusses the possible positive outcomes of the ECCC based on what has been seen in other similar contexts.

The ECCC has encountered problems since its establishment, which have been handled with varying degrees of success. As is outlined in the Problems and Limitations sections, there were

initial problems with human resource practices and limited outreach activities, and bias allegations have also arisen with regard to some of the international judges at the court, but these issues have been dealt with sufficiently. There are still problems with the Cambodian government trying to control the ECCC's functions and the court's response to corruption allegations has been severely lacking. This report recommends that a robust and transparent anti-corruption mechanism be put in place at the ECCC, that transparency of court proceedings is enhanced, that outreach activities are broadened, and that the ECCC should seek to improve its relationship with the Cambodian government whilst maintaining its independence. Although it is necessary for changes to be made at the ECCC for it to fulfil its complete potential, the problems it has encountered should not detract from the fact that the court is finally providing justice for millions of Cambodians. The court will not solve all of Cambodia's judicial problems; it can be, at best, a catalyst for future change. As long as expectations of what the ECCC can achieve are kept at a reasonable level, it has the chance to make a meaningful contribution to Cambodia, and towards the goals of structural prevention of mass atrocities.



3. The Responsibility to Protect and the Extraordinary Chambers of the Courts of Cambodia

Since 1945 the international community's promise of 'never again' has been repeatedly broken around the world. In response to the crimes in the 1990s in Rwanda, Somalia and the former Yugoslavia, the world sought to find an appropriate response to the occurrence of mass atrocities. Over the past decade, the Responsibility to Protect (R2P) principle has been developed as a means to prevent, react to and rebuild after genocide and other mass atrocities. At the 2005 World Summit, the members of the United Nations unanimously endorsed the concept of the Responsibility to Protect (R2P) and upheld the following commitments:

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter of the United Nations, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

140. We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.⁴

In 2009, Ban Ki-Moon identified the R2P as resting on three pillars in his report, *Implementing the Responsibility to Protect*. Pillar One is the responsibility of a state to protect its citizens, Pillar Two is the responsibility of the international community to assist states in upholding their obligations, and Pillar Three is the responsibility of the international community to act in a timely and decisive manner when a state is failing to meet its obligations.⁵ Prevention is an essential part of the responsibility to protect, and falls under pillars one and two. These

prevention measures fall broadly into two categories, direct prevention and structural prevention. Direct prevention occurs in situations where there is a risk of conflict or atrocities occurring imminently. Structural prevention takes a more long-term view and focuses on the root causes of mass atrocities, and tries to address them.⁶ International assistance and capacity building in the field of structural prevention can help states to better fulfil their protection responsibilities and contribute to the reduction of incidences of R2P crimes.

Negotiations to establish the ECCC in Cambodia began before the R2P had been clearly elucidated or accepted by members of the international community. Thus the court itself cannot be seen to be justified on R2P grounds, it was not established with specific R2P goals in mind. Trials are, by their nature, an after the fact occurrence, which can play no part in preventing the outbreak of the atrocity they have been assembled to judge. They also only rarely form part of the reaction to mass atrocities; one exception being in the case of the former Yugoslavia where the International Criminal Tribunal (ICTY) was established before the conflict had ended.⁷ What trials can do is help to rebuild a country devastated by mass atrocities, and in this way contribute to structural prevention of future mass atrocities. It is in the field of structural prevention that the ECCC can contribute most to significant advances in Cambodia. Given the relative infancy of the R2P, there is much that is still unknown about which structural prevention measures work, and which of these are most effective. The Secretary-General's 2009 report on implementing the Responsibility to Protect notes that 'Policy, however, cannot wait until the knowledge base is perfected. Experience and common sense suggest that many of the elements of what is commonly accepted as good governance... tend to serve objectives relating to the responsibility to protect as well'.⁸ Two key areas that Ban Ki-moon identified, which are particularly weak in Cambodia, are the rule of law and an effective and independent judiciary.⁹

An independent and effective justice system is a key aspect of good governance and plays an important role in structural prevention. A competent legal system can help to ensure the rights of all minority groups by affording the same rights to all citizens. If small scale abuses of minority groups can be dealt with through a court system then they are much less likely to develop into broader mass atrocities.¹⁰ Similarly, when a crime is seen to be motivated by ethnic, religious, national or other societal differences, it is important that those involved are inclined to use the legal system in place and not to resort to other, often violent, means to resolve conflicts.¹¹ As will be discussed later, the greatest impacts that the ECCC can have on Cambodia are in the justice system, through training, demonstrating international standards of justice, and bringing a symbolic end to local impunity.

Gareth Evans has claimed that 'No single rule of law issue is more important than the *eradication of corruption*'.¹² Eliminating, or at least curbing, corruption is a vital step in the development of the rule of law. Where corruption is entrenched in a particular country, as it is in Cambodia, the legitimacy of the government is undermined which 'intensifies social inequalities, encourages social fragmentation and internecine conflict, and propels a corrupt society into an unrelenting cycle of institutional anarchy and violence'.¹³ In Cambodia, the pervasive corruption of the Lon Nol regime (1970-1975) contributed to the support that the Khmer Rouge received before they came to power.¹⁴ Corruption also contributed to mass atrocities in Sierra Leone and countless other conflicts.¹⁵ Although corruption can hardly be cited as the main cause of mass atrocities, it is a contributing factor in a number of past instances. If the ECCC can effectively address corruption within its own institutions then this could have a trickledown effect on other aspects of Cambodian life.

In addition to the potential impacts the ECCC can have upon improving the rule of law and the independence of the judiciary in Cambodia, the court may also help the deter future atrocities, both nationally and internationally. The deterrence of future mass atrocities is

therefore the most direct preventative impact that a trial can have. The ECCC can fulfil this preventative role by redressing the culture of impunity in Cambodia. The former UN Secretary-General, Kofi Annan highlighted this relationship between ending impunity and prevention by including it as one of the five pillars of his Action Plan to Prevent Genocide.¹⁶ The hope is that through a consistent record of accountability for mass atrocities, future crimes can be averted through the credible threat of prosecution. Although, as will be discussed in the section on Impacts beyond Cambodia's Judiciary, there is no certainty that trials have a deterrent effect, Evans has asserted that the threat of prosecution is important, even if it has not yet reached the point where impunity for mass atrocities is eliminated.¹⁷ Similarly, Ban Ki-moon's report on implementing the R2P called criminal tribunals 'an essential tool' which are already 'reinforcing efforts at dissuasion and deterrence'.¹⁸ Every step towards deterrence is, by extension, a step towards prevention of mass atrocities and the furthering of the central goal of the R2P.

The many elements of structural prevention, and the relationships between these elements, are exceedingly complex and not yet well understood. As this report will show, there are positive impacts that the ECCC can have on the rule of law, the judiciary, and other areas of Cambodia which will contribute to structural prevention. The ECCC will not cure all of Cambodia's problems, or make Cambodian society immune from future mass atrocities, but it can be a step in the right direction.



4. Historical Background and Establishing the ECCC

On 17 April 1975, the Khmer Rouge took control of Cambodia's capital, Phnom Penh, and established their new regime, Democratic Kampuchea (DK). The three years, eight months and twenty days that followed have been described by survivors as “hell on earth” and “the prison without walls”.¹⁹ During this time, approximately 1.7 million Cambodians died from overwork, starvation, denial of medical services, torture and execution.²⁰ The Khmer Rouge's rule was the largest mass murder of the twentieth century when measured as a percentage of a national population.²¹ Ethnic minorities, religious groups, and urban populations were persecuted, money was abolished, Western medicine was rejected, and all aspects of daily life were regulated. On Christmas Day 1978, the Vietnamese army (aided by Cambodian defectors) launched an invasion of Cambodia and by 7 January 1979 they had arrived, virtually unimpeded, in Phnom Penh. Cold War politics ensured that whilst knowledge of the crimes of the Khmer Rouge quickly spread, and in Cambodia the Vietnamese were largely greeted as liberators, the new government was shunned by the international community as aggressors.²²

The leaders of the Khmer Rouge continued to live in relative comfort near the Thai-Cambodia border for years to come, free from credible prosecution. Immediately after the Khmer Rouge were driven from Cambodia, the newly-installed People's Republic of Kampuchea (PRK) created the People's Revolutionary Tribunal 'to try the Pol Pot-Ieng Sary Clique for the Crime of Genocide'. This tribunal did elicit some important survivor testimony but it was almost entirely a show trial, with judgements written in advance and no credible defence. Pol Pot and Ieng Sary were sentenced to death *in absentia*.²³ Although some international activists lobbied for an international trial of the Khmer Rouge, nothing eventuated.²⁴

Throughout the 1980s, the PRK was denied both recognition as the legitimate government of Cambodia as well as much international aid because of its ties to the Vietnamese communists. With the end of the Cold War, elections were organised in 1993 under the auspices of the United Nations Transitional Authority in Cambodia (UNTAC). The Khmer Rouge were included in the peace process but violated the ceasefire agreement frequently, refused to disarm and eventually pulled out of the 1993 elections. Following the elections, which saw an eighty-nine per cent turnout of registered voters, a new government was formed headed by Prince Norodom Ranariddh (of the royalist FUNCINPEC party) and Hun Sen (of the Cambodian People's Party, former Prime Minister in the PRK).²⁵ In July 1997, Ranariddh was ousted from power by Hun Sen, and more than fifty of his supporters killed, in what many analysts have called a coup.²⁶ Since then, Hun Sen and his Cambodian People's Party (CPP) have governed Cambodia without any substantial opposition.

One of Ranariddh and Hun Sen's last acts as Co-Prime Ministers was to send a letter to the Secretary General of the United Nations. Due to the internal fragmentation of the Khmer Rouge and a number of domestic political factors, they had decided to request 'the assistance of the United Nations and the international community in bringing to justice those persons responsible for the genocide and crimes against humanity during the rule of the Khmer Rouge from 1975 to 1979'.²⁷ In response, the Secretary General appointed a Group of Experts to assess the feasibility of prosecuting the Khmer Rouge. In March 1999 the Group of Experts reported that there was sufficient evidence to justify the establishment of a trial, and recommended an international trial along the lines of the International Criminal Tribunal for

Rwanda (ICTR) or the International Criminal Tribunal for the former Yugoslavia (ICTY). However, the Cambodian government rejected this suggestion. Since the original request for assistance, Hun Sen had overthrown Ranariddh and had also secured the defections of two high profile Khmer Rouge leaders to the CPP, Khieu Samphan and Noun Chea. The desire for a trial was further diminished by the death of Pol Pot in 1998, especially because Pol Pot is seen by many in Cambodia as personally responsible for the crimes of the Khmer Rouge; the period of Democratic Kampuchea is known locally as 'the Pol Pot time' (*samay a Pot*).²⁸ Since Hun Sen no longer perceived the Khmer Rouge as a threat, he had encouraged the country to 'dig a hole and bury the past and look to the future'.²⁹

Slowly negotiations began between the Cambodian government and the United Nations over the shape a trial might take. Both sides refused to compromise on almost all points. The main disagreement was over the fundamental structure a trial would take; whether it would be controlled primarily by Cambodian or international judges. Cambodia also faced pressure from the Chinese not to support a tribunal, since it could shed light on the Chinese role in supporting the Khmer Rouge. Mutual distrust between the UN and Cambodia was high and there was a general lack of communication, which resulted in the UN's chief negotiator, Hans Correll, withdrawing from talks in February 2002.³⁰ After Correll was mandated by a General Assembly resolution to resume talks, an agreement was finally reached and signed in June 2003. The fraught nature of these negotiations is made evident by the fact that whilst Sierra Leone and the UN reached an agreement on a mixed trial in six weeks, it took six years for an agreement to be reached in Cambodia.³¹

The Extraordinary Chambers in the Courts of Cambodia (ECCC)

The model finally agreed upon in Cambodia resulted in the formation of the Extraordinary Chambers in the Courts of Cambodia (ECCC), a hybrid court with both international and Cambodian participation, which became fully operational in June 2007.³² There are three chambers: Pre-Trial, Trial Court and Supreme Court. The Pre-Trial and Trial Court Chambers consist of three Cambodian and two international judges, and decisions require a 'super-majority', that is four of the five judges must agree in order to pass judgement. Similarly, the Supreme Court Chamber consists of four Cambodian and three international judges, with decisions requiring the agreement of five judges. There are joint Cambodian and international Co-Prosecutors and Co-Investigating Judges.³³ The Pre-Trial Chamber deals with any disagreements between the Co-Prosecutors or Co-Investigating Judges. This structure was designed to maximise Cambodian participation whilst ensuring that the international judges at the court could not be ignored.³⁴ The ECCC also has a Defence Support Section, to assist the defence teams, and a Victims Support Section, to inform and assist victims.

The scope of the ECCC is very clearly set out in the first article of the law establishing the court. Its purpose is to

bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized in Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.³⁵

This strict temporal jurisdiction was welcomed by the Cambodian government and the international community, and is to ensure that those who may have contributed to the Khmer Rouge coming to power, and those who supported them after they were overthrown by the Vietnamese, are not implicated at the court.³⁶ In addition, the stipulation regarding 'senior leaders' is designed to limit the number of prosecutions as much as possible. The ECCC has jurisdiction over both domestic and international crimes. In domestic law, it can prosecute those who committed homicide, torture or religious persecution under the 1956 Cambodian Penal Code.³⁷ The ECCC can also prosecute individuals for crimes of Genocide under the 1948

Convention, Crimes against Humanity, 'grave breaches of the Geneva Conventions of 12 August 1949' ('War Crimes'), destruction of cultural property, and crimes against internationally protected persons.³⁸

One aspect that the ECCC has developed further than most other international courts is the level of survivor participation. Anyone who was a victim of a crime, or who has knowledge of a crime, has the right to file a complaint with the Co-Prosecutors. From the information provided, the Co-Prosecutors decide whether to include the complaint in their investigations. Those people who were directly harmed by crimes committed by the defendants are entitled to become Civil Parties to a case and play a full role in proceedings.³⁹ This includes the right to call witnesses, question the defendant, and make a claim to reparations.⁴⁰ There were 93 approved Civil Parties in the first case (to be discussed below) and as of January 2010 the ECCC has approved 246 Civil Party applications for Case 2 and received more than 4,000 applications.⁴¹ This high level of participation arose partially out of experience in other international trials with less participation and out of the Cambodian court system which is based on the French civil law system.

As part of its hybrid nature, the ECCC is located in Phnom Penh and is funded jointly by the Cambodian government and international donations. The location of the court has meant that Cambodians can easily observe the trial process, with trips often organised as part of the court's outreach efforts. There were nearly 31,000 visitors to the ECCC during the first trial (Cases 1 and 2 are explained below).⁴² In terms of its finances, the budget for the court from 2005 until 2010 is US\$142.6 million; US\$105.7 million for the international component, US\$25.7 million for the Cambodian component plus a contingency amount of US\$11.2 million. The Cambodian government has not been able to meet its side of the budget and has sought bilateral aid to fulfil its commitments, much of which has been provided by Japan.⁴³ This is another significant advantage of hybrid trials; they are much cheaper than international criminal tribunals. In comparison, the ICTY has already cost US\$1.59 billion and the ICTR had a budget of US\$267 million for just 2008 and 2009, both significantly more expensive than the ECCC.⁴⁴

There are currently two cases before the ECCC. The first of these, Case 1, is of Kaing Guek Eav, alias Duch. Duch was the commander of S-21 (Tuol Sleng), a Phnom Penh prison and torture centre, where only 7 of the 14,000 people who arrived between 1975 and 1979 survived.⁴⁵ He has been in jail since 1999, originally charged under a 1994 law which outlawed the Khmer Rouge and from July 2007 he was detained by the ECCC on charges of Crimes against Humanity, War Crimes, Homicide and Torture.⁴⁶ His trial commenced on 17 February 2009 and closing statements were delivered 23-27 November 2009.⁴⁷ On 26 July 2010 the Trial Chamber found Duch guilty of Crimes against Humanity and War Crimes.⁴⁸ He was not convicted for domestic crimes as the international judges argued that the statute of limitations had expired whilst the Cambodian judges maintained that this limitation period should only begin from 1993 since Cambodia did not have a functioning judiciary that could have prosecuted Duch before then; since the necessary supermajority was not reached no conviction could be entered.⁴⁹ A sentence of thirty five years was imposed but five years of this were subtracted because of the period he spent in illegal military detention from 1999 until 2007.⁵⁰ With credit for time served, Duch will serve approximately nineteen more years in prison. Both Duch's defence lawyer and the Co-Prosecutors have announced their intentions to appeal the verdict to the Supreme Court Chamber of the ECCC.⁵¹

This first case before the ECCC is widely acknowledged by international and Cambodian commentators to have met international standards of justice.⁵² The verdict was greeted with mixed reactions from the Cambodian public. Immediately following the announcement, survivors of S-21 reacted angrily at the leniency of the sentence. Chum Mey cried 'I am not

satisfied!’ and Bou Meng called it ‘a slap in the face’.⁵³ However, three weeks later when they gathered to help the ECCC distribute copies of the verdict, they seemed to have been able to come to terms with the court verdict; Bou Meng said ‘this verdict is not 100 percent fair but it is acceptable’.⁵⁴ Aside from what some have considered to be too lenient a sentence, the other source of disappointment was the limited nature of Civil Party reparations. The court is empowered to award “collective and moral” reparations and the Trial Chamber accepted a request to have the names of the Civil Parties listed in the judgment, and for all statements of remorse or guilt made by Duch to be published; all other reparation claims were dismissed.⁵⁵ Although there is only a limited scope for the reparations that the ECCC can award, since there would be no source of funding for broader measures, some analysts had hoped that the court would have been more imaginative in the reparations it awarded. Since the Co-Prosecutors have announced they are appealing the verdict of Case 1, according to the internal rules the Civil Parties now also have the opportunity to appeal the for the award of further reparations.

Case 2 consists of four charged persons: Nuon Chea (“Brother Number Two”), Khieu Samphan (Head of State during Democratic Kampuchea), Ieng Sary (Minister of Foreign Affairs in DK), and Ieng Thirith (Minister of Social Affairs in DK and wife of Ieng Sary).⁵⁶ Nuon Chea was arrested in September 2007 and the other three in November 2007.⁵⁷ All four have been charged with violations of the 1956 Cambodian Penal Code, Crimes against Humanity and Genocide, relating to the treatment of Chams and Vietnamese, and all but Ieng Thirith have been charged with War Crimes.⁵⁸ The court has also ruled that the theory of Joint Criminal Enterprise can be applied to all international crimes, which should make prosecution in Case 2 easier.⁵⁹ On 14 January 2010, the Co-Investigating Judges announced the conclusion of the judicial investigation. Following the resolution of all appeals, the Co-Prosecutors announced on 16 August 2010 that they were requesting the indictment of all four charged persons on the crimes listed above.⁶⁰ The Co-Investigating Judges have stated that they will seek to issue a Closing Order, an indictment or a dismissal on some or all parts of the case, during September 2010.⁶¹ This would lead to the commencement of the second trial, if indictments are issued, in early 2011.

The ECCC has clashed with the Cambodian government over a number of issues, particularly over the scope of the investigations. Although no member of the Cambodian government has been associated with atrocities, many of them are former members of the Khmer Rouge and there are occasional rhetorical allegations about massacres perpetrated by government members, made by Cambodian opposition leaders and members of the US Congress.⁶² In September 2009 requests were sent to six members of the ruling Cambodian People’s Party (CPP) to attend a hearing at the ECCC to provide witness testimony. These six are President of the Senate Chea Sim, President of the National Assembly Heng Samrin, Foreign Minister Hor Namhong, Finance Minister Keat Chhon, and two CPP senators Ouk Bunchhoeun and Sim Ka. ⁶³ A second request has since been sent to Keat Chhon but none of the six have yet appeared before the court and a government spokesman has stated that it is the government’s position that they should not testify, although they can if they wish to.⁶⁴ It has also been reported that some of the defence teams requested that Hun Sen be interviewed, but that the Co-Investigating Judges decided he could not provide any additional information and so did not need to be interviewed.⁶⁵ Despite the non-compliance of these six CPP members, Co-Investigating Judge Lemonde concluded that it was ‘not feasible’ to continue to try to secure their appearance.⁶⁶

A second point of contention has arisen over the possibility of the prosecution of five further suspects in a third and fourth case. In December 2008 the Co-Prosecutors reported that they disagreed over whether to pursue further prosecutions or not, with the international Co-Prosecutor in favour and the Cambodian Co-Prosecutor opposed. Their dispute was referred

to the Pre-Trial Chamber. The Cambodian Co-Prosecutor argued that the additional submissions violated the spirit of the ECCC, which was formed to try senior leaders and those most responsible for crimes during Democratic Kampuchea, and could destabilise Cambodian society.⁶⁷ These arguments echo statements made by Hun Sen. The three Cambodian judges in the Pre-Trial Chamber agreed with the Cambodian Co-Prosecutor, and the two international judges agreed with the international Co-Prosecutor. Since no supermajority could be reached, the submissions were forwarded to the Co-Investigating Judges as per the internal rules of the ECCC.⁶⁸

Further problems were encountered in June 2010 with a disagreement between the two Co-Investigating Judges. The Cambodian Co-Investigating Judge had agreed to the commencement of investigations in Cases 3 and 4 but subsequently reversed his decision saying that the details of Case 2 should be finalised first and that further investigations must take into account the Cambodian social context.⁶⁹ Either party to the dispute has the right to bring the issue before the Pre-Trial Chamber but it is not clear if either have chosen to do this. The international Co-Investigating Judge has commenced investigations without his Cambodian counterpart (as per the ECCC Internal Rules), and the names of the five people contained in the submissions have not been made public. There is speculation that some or all of them may have links to the CPP, although it is highly unlikely that any are government leaders.

The structure of the ECCC was reached as a compromise between the UN and the Cambodian government, with each side seeking to maximise their own participation. Whilst the Internal Rules are unique and complex in some key areas, as a result of this compromise, they have worked effectively thus far. The robust investigations and trials conducted by the ECCC thus far stand in stark contrast to the functioning of the rest of the Cambodian judiciary. The Khmer Rouge abolished the entire court system during the 1970s. Whilst the current Cambodian justice system was re-established in the 1980s, even thirty years later it is still deficient in many key areas.



5. Current State of the Cambodian Justice System

'The Cambodian justice system has failed'.⁷⁰ This is how LICADHO, a prominent Cambodian human rights organisation, summed up the judiciary in 2007. This weakness in the judiciary is the result of both past violence as well as continuing structural and institutional flaws. The Khmer Rouge regime decimated Cambodia, and this included almost entirely destroying the justice system. Cambodia had between four and six hundred people with legal training before 1975, by 1980 there were only ten left.⁷¹ Over the last thirty years this situation has gradually improved but the Cambodian judiciary is still largely underqualified, corrupt, and under the control of the ruling Cambodian People's Party (CPP). Crimes committed by anyone with power, or with links to the CPP, are ignored, and the courts are manipulated by the CPP for use against opposition leaders. The justice system is largely inaccessible to the majority of Cambodians and, even when not dealing with political cases, the system is still weak and corrupt. All of these factors contribute to the culture of impunity that exists in Cambodian society which is a major obstacle in the development of the rule of law and hence to the implementation of the Responsibility to Protect.



A Cambodian People's Party (CPP) sign on National Highway 5.

Protection of the CPP and its Associates

The CPP has consistently utilised the Cambodian justice system to protect its members and their families, or when politically motive attacks have been committed. There are a number of opposition leaders, journalists, trade union activists and human rights workers who have been injured or killed by those with links to the CPP, and particularly by Hun Sen's personal body guards. A particularly prominent example of this was seen on 30 March 1997 when a rally was held in Phnom Penh by one of Cambodia's opposition parties at the time, the Khmer National Party (later renamed the Sam Rainsy Party). The rally was lead by Sam Rainsy, then leader of the Khmer National Party, to demand an independent judiciary. The peaceful rally was attacked with hand grenades, killing sixteen people and injuring 142 others.⁷² The FBI was involved in the investigation because one of those injured was an American. The investigation was hampered by threats made against its lead investigator, and by a lack of cooperation from CPP officials.⁷³ Eventually the investigation was left incomplete and no one has ever been charged in relation to the attack. Despite this lack of CPP cooperation, recently released reports from the FBI's investigation revealed what had long been suspected: that there is substantial evidence implicating forces loyal to the CPP.

A more recent case involved Chea Vichea, the President of the Free Trade Union of the Workers of the Kingdom of Cambodia. He was a prominent and outspoken critic of the government and advocate for human rights who was murdered on 22 January 2004. At the time the case was acknowledged by King Sihanouk as being 'undeniably political', and there was speculation that Chea Vichea had been assassinated on the orders of someone in the Cambodian government.⁷⁴ Two suspects were immediately arrested. They were released two months later by the investigating judge but soon rearrested when the Supreme Council of Magistracy returned the case for investigation and sent the judge who had released them to a position in the remote province of Stung Treng.⁷⁵ The two suspects were convicted in August 2005 and sentence to twenty years imprisonment. In securing this conviction, the prosecutor presented no evidence to link the accused to the crime and relied solely on a confession from one of the men which is claimed to have been elicited through torture. One of the men also had an alibi for the time of the shooting which was ignored.⁷⁶ The two men are widely considered to be scapegoats and the Cambodian justice system drew international condemnation over their conviction.⁷⁷ In a more hopeful sign, the Cambodian Supreme Court sent the case back to the Appeals Court in late 2008 for a retrial and ordered that the two men be released pending further investigation.⁷⁸ Although this is a welcome step for the men who were freed, it does mean that the murder of Chea Vichea is another politically related crime that has gone unsolved.

Further evidence of CPP control of the courts arises when the relative of someone powerful is charged with a crime. The case of Hun Sen's nephew is worth quoting at length from a UN report:

The trial and sentencing of Nhim Sophea, a nephew of the Prime Minister, is an example of how the courts operate in favour of the privileged and well connected. The accused was identified by witnesses as the person who opened fire on a crowd following a traffic accident in October 2003. Two people were killed and four were wounded. The accused was charged with voluntary manslaughter. The court at first instance provided no advance notice that the case would be heard on 11 March, and the trial was held in camera. Relatives of the victims were paid sums on the order of \$8,000 and did not testify before the court. ... Nhim Sophea received a sentence of 18 months in prison after charges against him were reduced to involuntary manslaughter. On 26 August, during another in camera hearing in the Court of Appeal, all charges against the accused were dismissed. The prosecutor did not appeal the case, despite the clear breaches of international and Cambodian law that had occurred. By way of contrast, the case following that of Nhim Sophea in the Phnom Penh court that same day was the trial of Kul Vinlay, a man charged with stealing 2,700 riel (\$0.65). He was sentenced to four years in prison after his mother was unable to pay the \$1,000 that had been sought in exchange for his release.⁷⁹

These are just some of many examples which show the extent to which the courts have been used to ensure impunity from prosecution for those with any links to the CPP.

Prosecution of Enemies

The justice system is also used to prosecute political enemies of the CPP, most frequently under defamation laws. The targets of these politically motivated judicial attacks are most often members of prominent opposition parties; FUNCINPEC in the late 1990s, and more recently the Sam Rainsy Party (SRP). In December 2005 Sam Rainsy, leader of the SRP, was convicted of defamation. He had alleged that Hun Sen was involved in the previously mentioned 1997 grenade attack. Rainsy fled to France when his parliamentary immunity was removed and he was sentenced *in absentia* to 18 months in jail. In February 2006, Rainsy recanted his accusations, was granted a royal pardon by King Sihamoni and returned to Cambodian

politics. All this, it seems, in exchange for his support for a constitutional amendment relating to the formation of governments following elections.⁸⁰ Previously, a party (or a coalition of parties) needed to control a two-thirds majority of the National Assembly in order to form a government; the amendment reduced this to a simple majority. This greatly consolidated Hun Sen's power as it means he will no longer have to rely on coalition partners to form a government, as he has been forced to in the past.⁸¹

In April 2009, another member of the Sam Rainsy Party, Mu Sochua, filed a defamation case against Hun Sen. She claims that comments Hun Sen made in the lead up to the 2008 election about a "strong-lady" "making trouble", and remarks regarding an incident in which her blouse became torn, were sexually disparaging.⁸² The courts dismissed her claim, and Hun Sen countersued on the basis that by bringing a defamation case against him she had defamed him.⁸³ The court ruled in Hun Sen's favour and Mu Sochua was fined the equivalent of US\$2,500 and ordered to pay damages to Hun Sen of US\$2,000.⁸⁴ Her appeal was dismissed.⁸⁵



CPP leaders: Chea Sim, Hun Sen (current Prime Minister) and Heng Samrin on a billboard in Siem Reap.

Following her refusal to pay these fines, Mu Sochua has had her parliamentary salary docked until the full amount has been paid; a move that does not require her consent.⁸⁶

In the most recent case, Sam Rainsy once again faced charges, this time in relation to border issues. On an October 2009 trip to Svay Rieng province, which is on the border with Vietnam, he and a number of local farmers removed border markers that they claim were encroaching on territory held by local Cambodian farmers. These actions resulted in his parliamentary immunity again being removed in November and he was charged with racial incitement and destruction of property in December.⁸⁷ On 27 January 2010, Sam Rainsy was found guilty in a closed door session and sentenced *in absentia* to two years in jail and a fine of nearly US\$2,000. Two villagers were also sentenced to one year in jail on similar charges.⁸⁸ Sam Rainsy is currently in exile in France and has stated that he will return if the two villagers are freed and their land returned to them.⁸⁹ He has also been charged in Phnom Penh with falsifying public documents and spreading disinformation in relation to his release of documents claiming to support his statements about Vietnamese encroachment.⁹⁰ These are all examples of the CPP's use of the judiciary to attack its political opponents.

As well as controlling court prosecution against opposition members, the CPP also orchestrates prosecutions as part of international political theatre. An example of this comes from the increasingly tense relationship between Cambodia and Thailand since clashes over Preah Vihear temple (a world heritage listed historical site on the border between the two countries) in 2008.⁹¹ Following these clashes, relations worsened when Hun Sen appointed former Thai Prime Minister Thaksin Shinawatra, who has been convicted of corruption in Thailand, as an economic advisor to the Cambodian government in October 2009. Following Thaksin's arrival in Cambodia, a Thai man, Siwarak Chothipong, was arrested and later convicted of

espionage. Siwarak worked for the Cambodia Air Traffic Service and it was alleged that he passed the details of Thaksin's flight into Phnom Penh to officials at the Thai embassy. He was sentenced to seven years in jail. Almost immediately, a royal pardon was issued from King Sihamoni. When Siwarak had a meeting with Thaksin, and was later welcomed to Hun Sen's home to receive his pardon, it became clear that this was a piece of political theatre designed to embarrass the Thai government. Thaksin called Siwarak a 'political victim of the Thai government' and Hun Sen's assistant stated that Siwarak was 'being freed because of the prime minister's concern of the love between mother and son and also the intervention from his excellency Thaksin Shinawatra'.⁹² These are blatant manipulations of the Cambodian judiciary to suit CPP political interests. What is particularly disturbing is the abuse of royal pardons for political reasons.

Judicial Weaknesses

This control of the judiciary by the executive is facilitated by the weaknesses in the Cambodia justice system, particularly the lack of educated professionals and the pervasiveness of corruption. As noted above, in 1980 there were only a handful of surviving Cambodians with legal training and the legacy of this is still felt. The Cambodian Ministry of Commerce has acknowledged that 'of the 120 or so judges who are actively employed in Cambodia, barely a handful of them have any proper legal qualifications'.⁹³ Nayan Chanda reported in 2003 that more than half of Cambodia's judges had not even finished high school.⁹⁴ Those judges who do have legal qualifications largely earned them from Soviet-bloc countries in the 1980s.⁹⁵ These educational problems are exacerbated by a lack of legal books and resources, especially in provincial courts. This institutional and resource based weakness limits the operation of the courts at the provincial level.

The other major weakness of the judiciary is corruption, which is ingrained in the entire system. It has been reported that bribes of up to US\$25,000 have been given to pass the entrance exam to the Royal Academy for Judicial Professions, the training school to become a judge or a prosecutor.⁹⁶ Having completed the qualifications considered necessary, judges are reliant on favour with the CPP to gain and then maintain their appointments.⁹⁷ This allows the executive to control the outcome of political cases, as in those discussed above. Judges and prosecutors earn US\$325-625 per month depending on their positions, and whilst this is an increase on pre-2003 salaries, it has not been enough to curb everyday corruption.⁹⁸ In 2008, 72% of Cambodians reported paying a bribe in the last year, although this was in all aspects of their life, not just in any interactions with the court. This was the second highest rate in the world.⁹⁹ Another 2008 survey, conducted by the University of California's Human Rights Centre, showed the distrust of the court system amongst the general population. Only 44.2% agreed with the statement 'Justice is the same for everyone', 36.1% said that they trust the Cambodian court system, 36.8% trusted Cambodian judges, and 60.7% agreed that 'Going to court means paying bribes to judges'.¹⁰⁰

Culture of Impunity

All of the factors described above have contributed to the development of Cambodia's pervasive culture of impunity. There is an expectation in Cambodian society that those who wield economic, political or military power are entitled to behave as they wish without facing legal consequences.¹⁰¹ In this situation, the establishment and maintenance of power becomes vital and promotes further abuses. Those who are loyal to the CPP are immune from prosecutions and punishment, and those considered a threat to their established power are persecuted through the courts. It is in this context that Yash Ghai, former Special Representative of the Secretary-General for Human Rights in Cambodia, noted that 'Courts become the central arena of violations of the law and the denial of justice'.¹⁰²

Above and beyond the many abuses of the current government, impunity in Cambodia is 'most ostentatiously exemplified by the crimes of the Khmer Rouge'.¹⁰³ Aside from a very limited show trial in 1979, no leaders of the Khmer Rouge were brought to justice until the establishment of the ECCC. This long running impunity for crimes against humanity is the basis on which further impunity has grown.¹⁰⁴ Etcheson has identified a tendency in Cambodian society to relativise all crimes in terms of those committed by the Khmer Rouge. The stealing of a motorbike or even the killing of a political opponent pales in comparison to the crimes of the Khmer Rouge. It is difficult to justify harsh sentences for small crimes committed in the last thirty years when those responsible for the worst crimes Cambodia has ever seen are only now being brought to justice.¹⁰⁵

Over the last ten years, a series of United Nations Special Representatives of the Secretary-General for Human Rights in Cambodia have identified impunity as a major problem in Cambodia. In 1999, Thomas Hammarberg said impunity 'constitutes the single most important obstacle to efforts to establish the rule of law in Cambodia' and, in 2005, Peter Leuprecht voiced 'serious concern over impunity as the key obstacle to the promotion and protection of human rights in Cambodia'.¹⁰⁶ It is this impunity, the control of the judiciary by the CPP, and the weaknesses within the justice system that the ECCC can begin to address.



6. Impacts of the ECCC on Cambodia's Judiciary and Government

There are deep and fundamental problems with the Cambodian judiciary, and one of the justifications frequently offered for establishing the ECCC is that it can play a positive role in addressing these problems. This section examines the direct impacts that the ECCC can have on the Cambodian justice system and government, specifically in terms of training Cambodian legal professionals, providing a demonstration of an international standard of justice, and limiting domestic impunity and corruption. The following section will look at other potential impacts of the ECCC about providing justice, the involvement of Cambodians, and a contribution to deterrence of future international crimes. These are only some of the impacts that the ECCC can have on Cambodia as a whole but they are key areas in which there is the potential for a meaningful contribution to be made and for the goals of structural prevention of mass atrocities to be advanced. There are, however, two qualifiers that must be noted. The first is that whilst the ECCC has great potential benefits, very few of them will be achieved without concerted efforts being made by court officials; the court will have the most impact if it implements broader programs and actively works towards specific goals relating to judicial reform, outreach, training and other key areas. The second is that the ECCC cannot be expected to single-handedly reform the judicial system but can help to make a step in the right direction.

Training

As was noted in the previous section, the lack of education of many of Cambodia's judges poses a serious impediment to the effective and impartial functioning of the justice system. The most direct and concrete impact that the ECCC can have on the Cambodian judiciary is to help train judges, prosecutors and lawyers. In 2007, the International Bar Association ran a training session on international law for sixty Cambodian lawyers, and it has continued its work since.¹⁰⁷ Judges, prosecutors and judicial personnel who were going to work for the ECCC also attended a number of rounds of training run by the United Nations Development Programme (UNDP) before the court became operational.¹⁰⁸ The Defence Support Section has also played a large role by offering a number of one-week training programs for potential defence lawyers on topics such as international criminal law, defending complex crimes, and case management.¹⁰⁹ Similarly, the Victims Support Section has run training for lawyers who wish to represent the growing number of Civil Parties at the ECCC.¹¹⁰ In Cambodia particularly, it is easier for training programs to have a greater impact. Since the Cambodian judiciary is so small, fewer programs can reach a larger percentage of legal professionals than they would in other countries.¹¹¹

Most of the opportunities for training at the ECCC have come about because of its hybrid nature.¹¹² At the International Criminal Tribunal for Rwanda, in contrast, the few Rwandans who were employed were either translators or menial workers, providing almost no opportunity for knowledge transfer.¹¹³ However, the mere fact of being a hybrid trial does not alone ensure the best education of domestic judicial personnel. Timorese judges at the Special Panel for Serious Crimes gained knowledge and experience but this was somewhat limited as language barriers hampered frequent contact with international judges.¹¹⁴ Thus far the ECCC has a mixed record of interaction between the Cambodian and international sides. There have been some divides in general administration, with Cambodian staff largely

reporting the Cambodian Director of the Office of Administration and international staff reporting to the international Deputy Director of the Office of Administration. This has resulted in split management structures, even within a single department.¹¹⁵ Although there have been some problems, the two Co-Prosecutors (despite their disputes over further prosecutions) and the two Co-Investigating Judges are reported to be working well together.¹¹⁶ The requirement for judges in each chamber to reach a supermajority, and the Internal Rules' stipulation that they attempt to reach a consensus, has encouraged cooperation amongst the international and Cambodian judges.¹¹⁷ This dialogue and collaboration between the judges can further the impact of training with the Cambodian judges benefitting from the experience of the international judges.

There are, however, a number of arguments which dispute the value and impact that training at the ECCC can have. The first is that training in any guise does not have a notable impact on rule of law development. Carothers has stated that 'judicial training, while understandably appealing to aid agencies, is usually rife with shortcomings and rarely does much good'.¹¹⁸ This comment was made in a broad context, not looking specifically at trials, and it seems that hybrid trials are advantageous training situations as they provide for both training and the application of that training in an immediate context with the support of international judges.¹¹⁹ This was implemented, for example, in East Timor where some international judges were assigned as mentors at various district courts.¹²⁰

In addition, Urs argues that the complicated nature of the court means that the lessons learned are not applicable in the domestic context.¹²¹ However, although the ECCC has a unique structure, it is firmly rooted in Cambodian procedures. The ECCC can deal with crimes under international laws as well as domestic crimes of homicide, torture and religious persecution as defined by the 1956 Cambodian Penal Code.¹²² Rules of procedure are also based as much on Cambodian practice as possible; the preamble to the ECCC's Internal Rules states:

Now therefore the ECCC have adopted the following Internal Rules, the purpose of which is to consolidate applicable Cambodian procedure for proceedings before the ECCC and ... to adopt additional rules where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards.¹²³

The court's structure has had to incorporate additional aspects to deal with the complex nature of the crimes being judged, and the joint participation of international and Cambodian personnel. It remains, however, part of the existing Cambodian court structure.¹²⁴ Therefore, the training benefits gained by Cambodian personnel can be easily applied to work within this domestic court structure.

Finally, a number of people have argued that whilst training may help to impart knowledge, this will not help to improve the Cambodian justice system. Both Linton and Urs contend that the problems faced in Cambodia are not ones of capacity but of abuse of power and a lack of impartiality.¹²⁵ There is also a concern, voiced by Hammergren, that even if those trained as part of the ECCC were to return to the Cambodian justice system and implement what they have been taught, this would place them in a difficult position given the CPP's assumption of control over judges. Once the UN has completed its mandate at the ECCC, the Cambodian judges who participated will be left in Cambodia with little support for international legal norms.¹²⁶ There are certainly valid concerns over the value of training programs. However, what each of these arguments says fundamentally is that training alone is not sufficient. The ECCC is a unique environment for Cambodian legal professionals to gain exposure to world-class experts and to implement a fair standard of justice. Whilst capacity is not the only limit

on the Cambodian judiciary, it is an important one, and the ECCC and its training programs can be a good step to improving the overall education level of Cambodia's judiciary.

Demonstrative Effect

Another hope for the ECCC is that by providing a model of justice which meets international standards it will encourage Cambodians to push for their domestic judiciary to meet those same standards.¹²⁷ As with training, this can be more easily achieved due to the hybrid nature of the court because Cambodians can visit the ECCC with relative ease and can see their own judiciary participating in the process.¹²⁸ This effect is perhaps amplified by the magnitude of the crimes being prosecuted. If even the Khmer Rouge, who committed the worst crimes Cambodia has ever seen, are afforded a fair trial and rights as defendants then there should be no doubt that all other Cambodians are entitled to the same rights when they come into contact with the justice system.¹²⁹ One concern with this line of reasoning is that it seems to assume that Cambodians are ignorant of the problems with their judiciary, which is far from the case. Despite awareness of the flaws of the system, and the best efforts of some NGOs, there has been no strong movement for reform.¹³⁰

Even though Cambodians are aware of the problems with their judiciary, the ECCC can have a demonstrative effect. It can demonstrate the mechanisms in place in international legal systems to ensure impartiality and fairness, and can show the severe dichotomy which exists between Cambodian and international standards of justice.¹³¹ One particularly valuable aspect of the verdict in Case 1 is that it acknowledged that a reduction of sentence was appropriate because Duch had been held in illegal pre-trial detention. This is particularly important because in Cambodia nearly ninety percent of defendants are held in pre-trial detention, many unnecessarily.¹³² However, as with most other areas, it should not be expected that the ECCC alone will suddenly create a mass movement within Cambodian society for higher judicial standards. At best the ECCC can draw public attention to the appalling state of the Cambodian justice system and act as a catalyst to promote change.¹³³ This is another area in which the application of specific programs, designed to promote awareness of the legal aspects of the ECCC, will greatly increase the impact the court can have.¹³⁴

Combating Impunity and Corruption

A clear and immediate effect that the ECCC can have is on the personal impunity enjoyed by the handful of high-ranking Khmer Rouge officials who the court will put on trial.¹³⁵ Although this alone has value, it is hoped that the ECCC can have a broader impact on impunity beyond these few individuals. Thomas Hammarberg, the former Special Representative of the Secretary General for Human Rights in Cambodia, thought there was a strong connection between impunity for the Khmer Rouge and continued impunity in Cambodia today.¹³⁶ His influence was a key factor behind Hun Sen and Norodom Ranariddh's 1997 letter requesting UN assistance because he recognised the broader impact a trial could have.¹³⁷

In a wider sense, an end to the impunity of Khmer Rouge leaders can indicate to Cambodians that government officials can be held accountable for the crimes they commit in office. Human rights workers hope that this will translate into a broader sense of accountability for the current government. Current developments at the ECCC provide the opportunity for the court to demonstrate that even members of the CPP are not above the law. In September 2009, International Co-Prosecutor Marcel Lemonde requested six CPP government officials appear at the ECCC to provide witness testimony.¹³⁸ The letters of request were made public not long after in a bid to put pressure on the six officials to appear. Thus far, none have appeared or agreed to appear.¹³⁹ Internal Rule 60 of the ECCC states that all witnesses must appear and gives the Co-Investigating Judges the right to request 'the Judicial Police to compel the witness to appear'.¹⁴⁰ The fact that these government officials have not yet appeared before the court, and seem unlikely to do so, sends an unfortunate message that those who are currently

in power are not answerable to the law. This issue will be discussed further in the Problems and Limitations section. The ECCC cannot undo the many instances of the CPP's impunity which were detailed in the previous section. What it can do is make a symbolic dent in the impunity that Cambodian leaders have always presumed for themselves.¹⁴¹

This end to impunity is also hoped to extend to a limiting of corruption. Corruption is prevalent throughout Cambodian institutions, from the school system to the judiciary.¹⁴² With such a pervasive system in existence, the ECCC can have at best a minor impact. However, if it can construct an effective anti-corruption mechanism within the court then this could be used as a model for future mechanisms in other contexts. If the corruption at the ECCC involves government officials, and appropriate measures are taken, then this could set an important precedent. Unfortunately, as will be discussed in the section on limitations, the ECCC has not yet dealt with corruption and this is one potential benefit of the court which is being lost so far. Each of these potential impacts of the ECCC play an important role in structural prevention. Capacity building through training of judicial officials and the demonstration of fair justice can help to develop a more independent judiciary. The rule of law is also an essential element of a stable country and this cannot exist without accountability. Through tackling impunity and corruption, the ECCC can help to build this culture of accountability in Cambodia.



7. Impacts beyond Cambodia's Judiciary

The potential impacts of the ECCC stretch far beyond the Cambodian judiciary. It is not possible to examine every area in which the ECCC will play a role, but this section will address some additional effects of the ECCC for both Cambodians and the international community. Whereas the effects on the judiciary had a specific capacity-building aim on a single Cambodian institution, the effects of the ECCC that will be discussed in this section have broader implications. The most fundamental reason for holding any trial should be to provide the element of justice that courts provide, and the importance of this in Cambodia will be discussed first. The ECCC has a much greater outreach and participation component for survivors of the Khmer Rouge than trials which preceded it and the results of this will be dealt with second. Finally, the contentious debate regarding trials as a deterrent against future mass atrocities will be addressed.

Right to Justice

There has been a great deal of debate surrounding the establishment of the ECCC, and a great deal of criticism levelled at it, but an important dimension that is often left out is the unending desire of survivors to see justice.¹⁴³ There can be no perfect justice but the immense suffering inflicted by the Khmer Rouge demands a response. Most fundamentally, a trial is about the right of those alive today to see justice; for themselves, for family members who died under the Khmer Rouge, and for family who survived the Khmer Rouge but did not live to see a credible trial.¹⁴⁴ Many survivors have voiced their opinions about the ECCC and their right to justice. A Cambodian scholar, Rath Many, has said 'setting up a credible tribunal [can] help the dead gain peace. And alleviate the sufferings of survivors'; Youk Chhang, director of the Documentation Center of Cambodia, 'I am not free. The only way to free us is to have a complete accounting, a real justice. Until that happens our psychological wounds cannot be healed. Without justice we will never have peace of mind'; and a survivor of S-21, Chhum Mey, 'If there is no tribunal I will keep crying until there is a trial. Only then will I stop crying'.¹⁴⁵

More broadly, one 2008 survey found that 86% of Cambodians agreed with the trial of the Khmer Rouge and another survey, also conducted in 2008, found 90.5% agreed that it was important to hold accountable those most responsible for what happened during the Khmer Rouge regime.¹⁴⁶ Cambodians also suffer the psychological effects of living during Democratic Kampuchea; the Transcultural Psychosocial Organization found that approximately one third of survivors suffer from post-traumatic stress disorder, which equates to approximately two million Cambodians alive today, or about fourteen percent of the total population.¹⁴⁷ Cambodia's mental health director, Dr. Ka Sunbaunal, has asserted that the mere existence of the trial is therapeutic for some people, and helps them rebuild their lives.¹⁴⁸ Finally, whilst to most outside observers the gap between the 1979 overthrow of the Khmer Rouge and the start of the first trial in 2009 seems large, 'for sufferers the length and breadth of the land it cannot be "long ago". For yet-mourning kin, the loss is as fresh as yesterday'.¹⁴⁹ This aspect of the ECCC will have very little impact on capacity building, rule of law, or any feature of prevention of mass atrocities. However, regardless of whether or not the other potential benefits of the ECCC discussed here actually occur, the ECCC's opportunity to provide a small measure of justice for Cambodians is reason enough for its existence.

Outreach

One of the unique aspects of the ECCC is its 'groundbreaking scheme for survivor participation' which is broadly regarded as one of the court's most promising aspect.¹⁵⁰ Although various offices within the ECCC perform outreach activities, it is largely the purview of the Victims Support Section and the Public Affairs Office. They have run extensive and varied programs to educate as many people as possible about the ECCC. For example, the Victims Support Section organises trips for people from provinces around Cambodia to come and see the ECCC and to attend a hearing if possible.¹⁵¹ They hold forums in various provinces at which Cambodians can learn about the ECCC and what role victims can play in the process, including organising to become Civil Parties before the court.¹⁵² They are also active in raising the profile of the court amongst Cambodians. At the 2009 Water Festival in Phnom Penh, two boats carrying ECCC banners competed in the boat racing competition that is held as part of this popular Cambodian festival.¹⁵³ Staff from the Public Affairs Section frequently distribute thousands of booklets and stickers in busy markets and bus stops in Phnom Penh.¹⁵⁴ They also operate a helpline which people can call for information on victims' rights and participation possibilities.¹⁵⁵ Events at schools are also an important component of the ECCC's outreach efforts, with officials from various sections of the court travelling to high schools around the country to answer students' questions.¹⁵⁶ Whilst previous international courts have had elements of outreach, the Victims Support Section is a new feature which is playing a vital role in bringing the ECCC to Cambodians.¹⁵⁷



Children from a community in Kandal province.

This education and outreach can have a number of beneficial impacts on Cambodian society. By being as entrenched in Cambodia as possible, the ECCC can more easily gain and maintain local legitimacy. This can ensure that all the other impacts discussed in this report will have the maximum possible impact; Cambodians are more likely to gain something from a process they feel involved in than one that seems to exclude them.¹⁵⁸ The presence of trials, and the distribution of knowledge about how mass atrocity crimes occur, is also hoped to make a population less susceptible to hate propaganda and divisions that are early stages of genocide.¹⁵⁹ In the aftermath of the Duch verdict the ECCC has begun to distribute five thousand copies of the complete verdict, and another seventeen thousand copies of a summary of the verdict, both in Khmer.¹⁶⁰ Outreach to schools is also important because approximately seventy percent of Cambodia's population were born after 1979 and there are still Cambodian youths who do not believe that Cambodians willingly killed other Cambodians, or

who have other questions relating to the Khmer Rouge regime.¹⁶¹ Until 2009 there were only six lines in Cambodia's seventy-nine page high school history textbook which discussed the Khmer Rouge.¹⁶² There is now an additional new textbook, published by the Documentation Centre of Cambodia, which has so far been distributed to 1,321 schools and deals exclusively with the Democratic Kampuchea regime; the government approval of this textbook may have been impacted by the existence of the ECCC which has encouraged the discussion of the Khmer Rouge period.¹⁶³ This education is important for Cambodia's future because 'youth are not just carriers of past trauma but also agents of future conflict or builders of sustainable peace'.¹⁶⁴ Educating a population about past atrocities can be part of a multifaceted approach to preventing future mass atrocities.

Deterrence

One of the main arguments made in favour of tribunals for international crimes, from the ICTY and ICTR to the ECCC, has been that they can have a deterrent effect on people considering involvement in, or perpetration of, mass atrocities. Deterrence can occur at a local level or at a more general, international level.¹⁶⁵ Specific deterrence can play an important role in preventing those who are on trial and imprisoned from committing further atrocities. It can also show the guilt of a number of individuals, thereby removing an element of conflict between groups and focussing on the individuals responsible.¹⁶⁶ This type of deterrence is significantly less important in the current Cambodian context. The Khmer Rouge were defeated militarily long before the start of the trials, and although ethnic minorities were persecuted, there are no current ethnic or religious divides in Cambodia which were caused by the Khmer Rouge's regime.¹⁶⁷ As such, the role of the ECCC is primarily one of general, rather than local, deterrence.

Theories of general deterrence have emerged from those of specific deterrence, where earlier massacres that went unpunished led to future atrocities. This was observed with the killing of Armenians in the 1890s, as well as smaller scale killings of Tutsis in Rwanda in the 1960s.¹⁶⁸ Midlarsky has argued that 'prevention of genocide in one location is dependent on prior occurrences not only in that location, but in almost any place in which successful intervention to prevent mass murder could have occurred, but did not'.¹⁶⁹ It is supposed that by prosecuting those who have committed mass atrocities, people contemplating such acts in other places around the world will be deterred by the threat of prosecution and the obvious international condemnation.¹⁷⁰ The former United Nations Secretary General's Special Advisor on the Prevention of Genocide, Juan Mendez, has stated, 'I think the whole idea behind the genocide convention – that it's a convention to prevent and to punish the crime of genocide, is precisely that punishment plays here a preventative role'.¹⁷¹ As was mentioned in the section on the Responsibility to Protect, this deterrence is the most fundamental way of preventing mass atrocities.

Despite the hopes of deterrence, a number of authors have found that there is no empirical evidence of its existence from the various tribunals which have been, or are still being, conducted around the world.¹⁷² In the former Yugoslavia, some of the worst crimes occurred after the 1993 establishment of the ICTY, including the 1995 massacre at Srebrenica and the 1998 'ethnic cleansing' in Kosovo.¹⁷³ There are also problems with the fundamental assumptions which underpin deterrence arguments; as Bass has argued, 'men willing to commit mass murder are terribly difficult to dissuade'.¹⁷⁴ It seems unlikely that those planning to perpetrate mass atrocities apply a cost-benefit analysis to their actions.¹⁷⁵ Particularly in the case of genocide, the dehumanization that precedes killings means that the perpetrators may not consider what they are doing to be a crime, negating any deterrent effect.¹⁷⁶

It is clear that if trials do have a deterrent effect it is not immediate or dramatic, but this does not mean it does not exist. It is a difficult thing to prove, as it would involve measuring the non-

occurrence of mass atrocities.¹⁷⁷ Wippman has described the role of international tribunals in preventing future atrocities as a 'plausible but largely untested assumption' and Mendez characterises it as 'an act of faith'.¹⁷⁸ So far, it seems that trials have not proven to be any deterrence for the perpetration of broader crimes, but there is anecdotal evidence that suggests it can have an impact on some individual perpetrators.¹⁷⁹

Human Rights Watch in particular have collected evidence of deterrence in a number of African countries. In Côte D'Ivoire in November 2004, the government-controlled television and radio stations were broadcasting ethnic hate propaganda. When a UN representative warned that a case could be referred to the International Criminal Court (ICC), however, the messages changed to ones of restraint, which helped to calm the situation.¹⁸⁰ The March 2006 transfer of Thomas Lubanga Dyilo from the Democratic Republic of the Congo to the ICC for using child soldiers also had a noticeable impact. It helped to inform people that using children as soldiers is a war crime, and a number of generals and militia leaders who met with Human Rights Watch expressed their desire to comply with the law in order to avoid being transferred to The Hague.¹⁸¹ It is hoped that the effects of deterrence will continue to build as international trials, including the ECCC, show that mass atrocities will not be tolerated and that those responsible will have to face justice. Given the large increase in the last fifteen years in the number of trials held for international crimes, it may still be too recent to judge the deterrent effect that these have had.¹⁸² The process of building an international culture of accountability is long and slow but the ECCC, and other trials like it, can be a small but important step along the way.



8. Problems and Limitations

The preceding sections have outlined the positive impacts that the ECCC can have on Cambodia and how these can help with the development of structural prevention of mass atrocities. However, the ECCC is far from perfect. It does have the potential to effect positive change in Cambodia, but there are problems which have been encountered that diminish its capacity to do so. The primary impact of these problems has been on Cambodian and, to a lesser extent, international perceptions of the ECCC. In each case there are underlying issues which must be addressed, but beyond this the court must deal with these issues with an awareness of the importance of a Cambodian sense of involvement and trust in the ECCC. Some of these issues have been dealt with effectively, whilst responses to others have been lacking. The primary issues which need to be addressed are allegations of corruption and bias, the potential discrediting impact that the involvement of Cambodian judges can have, Hun Sen and other CPP members' attempts to interfere with the court, and the limited nature of outreach activities. The ECCC has reacted well in a number of these areas, with the notable exception of corruption, to deal with issues that have arisen, but it has not played an active role in trying to pre-empt and prevent problems from emerging.

Corruption and Maladministration

Since its establishment, the ECCC has been plagued by allegations of mismanagement and corruption. In Cambodia, employment is often based on family connections or willingness to pay large bribes, rather than suitability for the position.¹⁸³ Given its location and structure the ECCC has faced similar human resource management problems. The most damning evidence of this came from a report compiled by the UN's Office of Audit and Performance Review at the request of the Cambodian office of the UN Development Program. This audit was conducted in the early part of 2007 and the report was finalised, although not made public, in June 2007.¹⁸⁴ Leaked sections of the report appeared in an article in the *Wall Street Journal* on 21 September 2007 and the ECCC released the entire report on its website on 1 October.¹⁸⁵ This report found widespread problems in the human resource practices at the ECCC. Cambodian staff were being paid too much, staff were being hired without meeting the requirements for the position, the hiring process was largely undocumented, some staff members had received massive unexplained pay increases, and the auditors were denied access to the files of some staff members appointed by the Cambodian government.¹⁸⁶

The report made numerous recommendations to address these deficiencies, including transparency and better documentation in hiring practices, a review of salary scales, and most dramatically 'all the recruitments of staff made by ECCC to-date should be nullified and a new recruitment exercise launched'.¹⁸⁷ If the issues outlined were not addressed, the report recommended that the UNDP give 'serious consideration' to 'withdrawing from participation in the project altogether'.¹⁸⁸ Although not all of the audit's recommendations were enacted, as this would have meant firing a large percentage of staff and then considering whether to rehire them, vast changes were made. A Personnel Handbook was adopted which set out policies and procedures in key areas and a short term expert advisor, David Tolbert, was appointed by the UN.¹⁸⁹ In February 2008 a new report by a team of human resource consultants was commissioned through the UNDP. This new report noted that there had been no new allegations of mismanagement, that although Cambodian salaries were high they were not unreasonably so, and that the human resource management 'practices of the ECCC national side are robust and ready to take on the challenges of the next phase of

operations'.¹⁹⁰ So whilst monitoring is still needed in this area, the ECCC has largely overcome the initial problems it encountered. It is also worth noting that these problems do not arise only in hybrid courts, the ICTR, for example, encountered similar operational difficulties and mismanagement in its early stages.¹⁹¹

What remains unaddressed is corruption, allegations of which have been around since the ECCC became functional in 2007. Most frequently these involve allegations that Cambodian staff have to kickback a percentage of their salary to government officials. Amounts vary, anywhere up to thirty percent, and most allegations claim that this money is sent to Sean Visoth, Director of the Office of Administration.¹⁹² In the first UNDP report mentioned above, the auditors 'found no evidence that would conclusively support' corruption allegations.¹⁹³ However, they also noted that such allegations are particularly difficult to prove. In response to Cambodian complaints to UN officials at the ECCC about corruption, the UN Office of Internal Oversight Services conducted a review in September 2008, which was forwarded to the Cambodian government but not made public, and is believed to have found that corruption allegations are credible.¹⁹⁴ It is also alleged that Knut Rosendhaug, the Deputy Director of the ECCC's Office of Administration, told a German delegation visiting in October 2008 that Sean Visoth had been found guilty of corruption by a UN investigation.¹⁹⁵ In November 2008, Sean Visoth went on extended medical leave and has not yet returned to his position at the ECCC, although he still receives a salary from the court and his replacement is still listed on their website as being the Acting Director of the Office of Administration.¹⁹⁶ It is possible that this is the ECCC's way of dealing with corruption without embarrassing a government official with a direct dismissal, which could have caused further tensions between the court and the Cambodian government. Whilst this may help to deal with some specific instances of corruption, and there have been fewer allegations made publicly in the last year, these sorts of measures do not deal with the problem as a whole. With little known about Sean Visoth's departure, the ECCC has also not taken any public action to counter the recurrent corruption allegations, which featured widely in Cambodian media, and damage the reputation of the ECCC. There are also concerns that unless the issue is adequately addressed, all the verdicts of the ECCC could be challenged on the basis of a lack of independence and fairness.¹⁹⁷

In August 2009 the UN and the Cambodian government agreed to establish an Independent Counsellor at the ECCC who would be in charge of the court's anticorruption program, and who is supposed to be available for all staff to make complaints. The person selected for this position is Uth Chhorn, head of the Cambodia National Audit Authority, a body which whilst independent of the Cambodian government in theory is rarely so in practice.¹⁹⁸ This is a small improvement in the anti-corruption mechanisms at the ECCC but there has been no significant action taken thus far. In a statement at the end of March 2010 the Cambodia National Audit Authority announced that the Independent Counsellor had begun investigations into three received complaints, two from Cambodian staff and one from a UN staff member. The investigations are currently in progress and a public report was expected in July, although as of mid-August no report has been released, with delays attributed to the business of UN staff at the court.¹⁹⁹ Assuming a report will be released soon, this can be a positive step, but is certainly not enough to counter the perception of a corrupt court yet. Although there have been assertions that all complaints will be dealt with confidentially, there has been no indication of what procedures are in place to ensure protection and anonymity for whistle-blowers.²⁰⁰ Also, whilst investigations have begun, there is no guarantee that any concrete action will be taken in response to these allegations. Thus, whilst these new investigations are a positive step it cannot yet be concluded that the ECCC has dealt with corruption; only that it has embarked on the first step.

Bias

A second area where the ECCC has drawn negative attention is frequent bias allegations made by various defence lawyers for defendants in Case 2.²⁰¹ These seem to be part of a strategy of the defence lawyers to call into question the validity of the ECCC, in order to set up grounds for future appeals and to discredit the court's work in the eyes of the domestic and international community. In October 2009, the defence lawyers for Ieng Sary filed a motion with the Pre-Trial Chamber calling for the disqualification of Co-Investigating Judge Marcel Lemonde over allegations of bias. This motion was quickly followed by similar expressions of concerns from the lawyers for Khieu Samphan and Nuon Chea.²⁰² Their claims were based on a statement made by Wayne Bastin, a former Chief of the Intelligence and Analysis Unit in the Office of the Co-Investigating judges, who left the ECCC in August 2009. His statement claimed that Lemonde had stated at a meeting, 'I would prefer that we find more inculpatory evidence than exculpatory evidence'.²⁰³ According to the ECCC's Internal Rules, Co-Investigating Judges are supposed to conduct their investigations impartially and to seek out all types of evidence equally, whether they show the suspect's guilt (inculpatory) or innocence (exculpatory).²⁰⁴ Lemonde claimed that he did not remember making such a statement and that if he did it must have been as a joke. Ultimately, the Pre-Trial Chamber rejected the defence's motion. They concluded that the evidence presented by the defence was not strong enough to justify the dismissal of Lemonde. The reasons for their judgement included: the statement provided by Bastin was limited in its scope and no further evidence that Lemonde made such a comment had been presented, the quotation expressed a preference and not an explicit instruction, and the alleged statement was made in English, which is not Lemonde's first language, and therefore did not carry its full meaning.²⁰⁵ Also, the value of a single sentence in the context of a two year investigation was not considered substantial.²⁰⁶

Two weeks after filing their original motion against Lemonde, but before it was ruled on, Ieng Sary's defence team filed a request for a public hearing, this time over the independence of the international judges in the Pre-Trial Chamber. They cited comments made by Prime Minister Hun Sen in a speech saying, 'I know that some foreign judges and prosecutors have received orders from their governments to create problems here... There is no doubt that they received advice from their government to do so'.²⁰⁷ The defence team requested a public hearing over these comments suggesting that Hun Sen is widely respected in Cambodia and that his comments would lead many to perceive bias. Since the Pre-Trial Chamber had just made a decision that Hun Sen opposed, and in the context of the rest of his speech, this statement was taken to refer to the two international judges of the Pre-Trial Chamber, Lahuis and Downing. The defence filing asked the ECCC to 'use its inherent discretionary powers in taking all necessary and reasonable measures to clarify and/or verify the alleged conduct of Judges Katinka Lahuis and Rowan Downing'.²⁰⁸ The defence was not alleging bias on the part of the international judges, merely stating that bias could be perceived by a 'reasonable person'. There is no basis for the ECCC to conduct a public hearing of the type requested in this matter. On these grounds, and since no evidence of actual bias was provided, the Pre-Trial Chamber (with the two reserve international judges rather than those that the motion referred to) dismissed the request.²⁰⁹ These frequent motions alleging bias on the part of international participants in the ECCC could have a detrimental impact on Cambodian perceptions of the court, and sometimes seem specifically designed to do so by the defence.

Although there is the potential for these bias claims to damage the reputation of the ECCC, various measures have been taken to limit any negative impact. Since the Pre-Trial Chamber is responsible for judging all issues that arise prior to a trial (including bias allegations), it was important that future decisions could not be subject to appeal based on alleged bias on the part of the two international judges, Lahuis and Downing. As such, the Pre-Trial Chamber ruled first on the request regarding Judges Lahuis and Downing, on 30 November 2009, so that future decisions would not be tainted.²¹⁰ This then allowed the Pre-Trial Chamber to dismiss

the allegations against Co-Investigating Judge Lemonde on 9 December 2009.²¹¹ This was scheduled to precede the announcement by the two Co-Investigating Judges of the close of investigation, on 14 January 2010, so that it too was not impacted by persisting allegations.²¹² The Pre-Trial Chamber also ruled to make all documents relating to Ieng Sary's claim against Judges Lahuis and Downing public, which helped to further increase the transparency of the court process.²¹³ This is an example where the ECCC has no control over possible future claims made by the defence but where it can react appropriately when such situations arise.

Involvement of Local Judiciary

A major point of concern since talks first began to establish the ECCC has been that the involvement of Cambodian judges will greatly hinder the court's activities through partiality and a lack of knowledge.²¹⁴ Since the government announced the Cambodian judges who would take part in the ECCC, some have come under specific attack over their past judgements and actions. There are three prominent examples of this. Ney Thol, who sits in the Pre-Trial Chamber, is a member of the Cambodian People's Party's central committee, has presided over the trials of a number of opposition politicians, and does not have a law degree.²¹⁵ Thou Mony ruled twice against the supposed Chea Vichea "killers" (the assassinated trade unionist discussed earlier in the section on Cambodia's judiciary), acquitted Hun Sen's nephew of manslaughter, and now sits in the Trial Chamber.²¹⁶ The President of the Trial Chamber, Nil Non, has admitted in a past interview that he has accepted money from parties in court cases he judged.²¹⁷

Given that the Cambodian government retained the sole right to appoint the Cambodian judges, it is not surprising that those who received these lucrative positions are in favour with the CPP.²¹⁸ Furthermore, commentators have claimed that the links between the ECCC and the domestic Cambodian judiciary will undermine trust in the trial of the Khmer Rouge leaders.²¹⁹ In a survey conducted in late 2008 in Cambodia, only 36.1% of respondents agreed with the statement 'I trust the Cambodian court system' and 36.8% agreed that they trusted Cambodian judges.²²⁰ However, 66.7% believed that the judges at the ECCC would be fair, and 67.1% believed that the ECCC is neutral.²²¹ Although there should be awareness of the limitations that involving Cambodian judges brings, these do not yet seem to have done damage to Cambodians' perceptions of the credibility of the ECCC, and care should be taken not to overstate the potentially negative impacts given the many positive ones that also exist.²²²

Domestic Political Interference

Another substantial concern raised over the structure of the ECCC was the potential for domestic political interference in the court, particularly from the CPP. This can have a wide ranging impact because, as Peskin has noted, 'whether societies come to value tribunals as an equitable and effective way to confront their violent pasts may ultimately depend more on the approval of a nation's leaders than in anything an outreach programme may say or do'.²²³ As described earlier in the introduction to the ECCC, the court has clashed with the government over two main issues: the request from the Co-Investigating Judge for six government officials to appear as witnesses, and the international Co-Prosecutor's submission of five more suspects for investigation. Hun Sen, and other CPP members, have made numerous statements opposing these two positions.

None of the six summoned government officials have made public statements about whether they intend to appear before the court but other CPP members have. The government spokesperson, Khieu Kanharith, has stated that whilst the six concerned are welcome to appear at the court if they choose, the government's position is that they should not. He also said that the international participants in the trial could 'pack their clothes and return home'

over the issue if they wished.²²⁴ Hun Sen has adopted a slightly obscure logic with regard to government members testifying. He has stated that ‘These [officials] made the Pol Pot regime collapse, and they adopted the law on the Khmer Rouge tribunal, so if they go as witnesses, it would make the accused persons guilty... How is justice to be done? My main problem is that turning the plaintiffs into witnesses would doom the accused’.²²⁵

Hun Sen has also been particularly vocal with regard to the prosecution of additional Khmer Rouge leaders. Amongst his many comments on the issue: ‘I prefer the failure of the tribunal than to let the country fall into war... It will not be the court eradicating the war. But be careful of the court making war’; ‘If the court wants to charge more former senior Khmer Rouge cadres, the court must show the reasons to Prime Minister Hun Sen... Hun Sen only protects the peace of the nation. I do not affect to the court issue’; and ‘Now, if you try the former Khmer Rouge leaders without thinking of peace and national reconciliation, war will happen again, killing 200,000 to 300,000 more, and who will be responsible for this?’.²²⁶ What is particularly worrying is that the Cambodian Co-Prosecutor echoed many of the same sentiments in her submission to the Pre-Trial Chamber opposing the additional submissions, as did the Cambodian Co-Investigating Judge in his refusal to approve the investigations.²²⁷ Since the Cambodian Co-Prosecutor, the Cambodian Co-Investigating Judge, and the three Cambodian judges in the Pre-Trial Chamber opposed the submissions, as Hun Sen does, there has been speculation that they faced pressure to act in accordance with Hun Sen’s opinions on the ECCC.²²⁸

With each of these statements, and many more, it is clear that Hun Sen is trying to influence the functioning of the ECCC, or at least give the impression that he can. That none of the six summoned CPP members have appeared before the court sends a message that the ruling party is beyond even international justice institutions. If the ECCC is perceived as being just as controlled by the CPP as the domestic justice system, then it will only further entrench the perception, and actuality, of executive control. An important step which Co-Investigating Judge Lemonde took in early October was to release the cover letters of the six summonses to the media when he did not receive a response from the government officials. Presumably this was intended to generate public pressure on the government but this has backfired as it was not supported by any further action when the CPP officials continued to refuse to appear.

The ECCC does work to ensure that any perception of government control is limited as much as possible, but is constrained by the necessity of having a working relationship with the government. The ECCC’s spokesperson, Lars Olsen, asserts the independence of the court following each of Hun Sen’s outbursts. After one of Hun Sen’s comments for example, Olsen made a public announcement saying ‘the court operates independently of the executive branch and anyone else. We are the court. We follow the law. So we will make our decision according to the law’.²²⁹ With regard to the six summoned CPP members, Olsen has also announced that, ‘Since we have not received a refusal, we would still be hopeful that they would cooperate with the court because, as you know, a summons is not an optional thing. It’s an order to appear before the court’ and ‘We would expect that any law-abiding citizen would comply with a summons issued by a court of law... That would apply especially to any representative of organs that played a crucial role in setting up the ECCC’.²³⁰ These statements continuously asserting the autonomy of the ECCC from the Cambodian government are important, but they may not be enough to counter the image of CPP control in a country so used to executive interference.

Survivor Involvement

A crucial part of the ECCC is the involvement of the survivors of the Khmer Rouge, ranging anywhere from participation in an outreach program to becoming a Civil Party in one of the cases before the court. Outreach efforts were hampered in the early stages by a lack of consistent or adequate funding, and the ECCC largely relied on NGOs to inform Cambodians

about the trials.²³¹ Early budgets contained money for a Public Affairs Office and a Victims Support Section but nothing in the way of funding for active outreach programs.²³² At the end of 2008, eighty-five percent of Cambodians knew nothing or only a little about the ECCC, and only three percent could identify the five people who were being detained.²³³ Since the middle of 2009, however, the outreach activities of the ECCC have increased greatly, facilitated by a new head of the Public Affairs Office, Reach Sambath, and the start of the Duch trial.²³⁴ A more extensive outreach program is being developed for the period between the conclusion of the trial of Duch and the commencement of the trial of suspects in Case 2.²³⁵ Due to early criticism and the aid of additional funding, the outreach activities of the court have improved greatly and are playing a key role in promoting Cambodian ownership of the trials at the ECCC.

The most active way for survivors to be involved with the ECCC is to become a Civil Party to one of the cases. Although the goals of this program are admirable, there have been some problems with implementation. Civil Parties have the right to participate as full parties to the trials, including summoning and questioning witnesses, questioning the accused, and making closing statements.²³⁶ There were 93 Civil Parties in the case against Duch and 246 have been approved for Case 2 so far, and these large numbers necessitated a more streamlined approach than in cases where a crime may only have a handful of victims.²³⁷ During Duch's trial there were issues of repetitive submissions by Civil Party lawyers, lawyers who are largely acting *pro bono* being unprepared, ill-prepared Civil Party witnesses, insensitivity of judges towards civil parties, and an 'inequality of arms' between the defence and the combined presence of the Civil Parties and the Co-Prosecutors, with two defence lawyers against ten other lawyers.²³⁸ In order to overcome some of these challenges, the process for the participation of Civil Parties in Case 2 has been changed dramatically in light of lessons learned from Case 1. At an ECCC Plenary Session in February 2010, new rules to govern the role of Civil Parties were announced, designed to address more adequately victims' needs and to ensure efficient functioning of the court. All civil parties will now be consolidated into one group (in Case 1, grouping had been encouraged and had resulted in four main civil party groups) which shall be represented by two Civil Party Lead Co-Lawyers and supported by Civil Party Lawyers. A single claim for reparations will be submitted to cover all civil parties, and deadlines for filing of civil party applications have been shortened.²³⁹ The ECCC also approved additional budgetary and administrative measures which should help to enhance Civil Party representation.²⁴⁰ The success of these new measures will not be fully known until they are put into action when the trial for Case 2 starts.

As can be seen, the ECCC has encountered a number of problems since its establishment, some of which have been dealt with more effectively than others. The human resource management practices of the court have greatly improved, allegations of bias have been dealt with efficiently and effectively, and survivor involvement in the process has greatly increased. Corruption is the largest unresolved issue still facing the ECCC; the measures currently in place are inadequate to have any considerable impact. Also, whilst the ECCC's spokesperson's rebuttals of Hun Sen's comments are necessary to maintain the court's credibility, they are largely reactive rather than pre-emptive. The court would be better served if Hun Sen could be encouraged to not make such statements in the first place, as difficult as this would be. Recommendations on these, and other, issues will be given in the following section. It is clear that whilst there continue to be some problems at the ECCC, and these should not be ignored, the court has a growing record of dealing effectively with problems that present themselves. Criticisms of small aspects of the ECCC's functioning should not tarnish the rest of the work it does.



9. Recommendations and Conclusions

Given the shortcomings which have just been outlined, and which limit the potential positive impacts of the ECCC, this report now considers some recommendations and conclusions. These recommendations cover strengthening existing mechanisms and taking advantage of new opportunities. They include: strengthening anti-corruption mechanisms at the court, increasing transparency, furthering outreach and judicial training programs, and improving relations with the Cambodian government.

Recommendations

As the previous section identified, corruption is the greatest problem facing the ECCC which remains insufficiently addressed. In August 2009 an Independent Counsellor was appointed to the ECCC, who is supposed to be independent of the ECCC, the UN and the Cambodian government.²⁴¹ The Independent Counsellor, Uth Chhorn, stated in a September 2009 press conference that all staff members were free to contact him, that complaints would be dealt with confidentially, and that if complaints were determined to be “well-founded” then the necessary information would be sent to UN Assistant Secretary General for Legal Affairs, Peter Taksoe-Jensen, and Cambodian Deputy Prime Minister Sok An.²⁴² The staff members at the ECCC received a blanket email of introduction in November 2009 and a staff meeting was held to describe the role of the Independent Counsellor in February 2010.²⁴³ The powers the office of the Independent Counsellor has and details of how complaints will be dealt with have not been made available. The lack of information about this role, despite nine months since its creation, shows a complete lack of transparency. Whether it is through strengthening the existing anti-corruption mechanism and the role of the Independent Counsellor or instituting a new system, the ECCC must respond to the corruption allegations that have plagued it since its creation. As a basic standard, this anti-corruption mechanism must have clear structures in place to ensure the confidentiality of any complaints, and must be transparent in its process for dealing with complaints.

This transparency is essential in all aspects of the ECCC. Although some documents related to various decisions of the ECCC have been released, there has been no consistency in which documents are released and when.²⁴⁴ Some decisions about the publication of documents have been left up to the Director of the Office of Administration, who should not have such authority and who has no guidelines as to when the release of documents is appropriate.²⁴⁵ There are legitimate confidentiality concerns relating to the publication of court documents and these should be respected. However, to ensure the ECCC is as transparent as possible, the court should publish all decisions, filings, submissions and related documents whenever possible, in redacted versions if necessary. A recent positive step in this direction was the announcement in February 2010 of the creation of a virtual tribunal which will make “available to the public all trial related materials such as decisions, filings, trial transcripts and videos of the court proceedings”.²⁴⁶ This new platform of information will be most effective if there is a consistent and transparent policy regarding the release of documents.

The coming year provides an opportunity but also a challenge to the ECCC’s outreach and legacy programs. With the conclusion of the trial in Case 1, and a trial of Case 2 not expected to start until early 2011, there is the possibility that the ECCC will lose some of its public profile, or at least be seen as suffering from excessive delays. It is essential that the Public Affairs Section maintains an active outreach program to continue to inform the

Cambodian public about the work of the ECCC and to maintain the reputation of the court. There are plans for this continued outreach including similar trips from rural areas as occurred during the trial of Duch and extended school activities.²⁴⁷ Although funding of the outreach programs of the ECCC has increased, there is still more that could be achieved with additional funding. Especially in Cambodia, because of the problems of illiteracy and the difficulty of reaching rural areas, substantial funding is required for a continued effective outreach program.

The final important obstacle that the ECCC must overcome is its turbulent relationship with the Cambodian government. Any perception that the court is being controlled by the government will do serious damage to its credibility, and any actual control will relegate the ECCC to being little more than a series of show trials. There are current issues over the appearance of CPP officials at ECCC hearings, and the prosecution of additional suspects. Since the six officials in question continue to refuse to appear, and no further action has been forthcoming to compel them to appear, the staff at the ECCC must work to counter the perception that they are subservient to CPP interests. The additional Case 3 and Case 4 submissions have now been forwarded to the investigative phase, and with the disagreement between the Co-Investigating Judges the case could once again be referred to the Pre-Trial Chamber. Although there is no direct evidence, it is widely believed that the Cambodian judges and prosecutor at the ECCC face pressure, be it direct or indirect, from the Cambodian government to act in accordance with its wishes not to proceed with Case 3 and Case 4. If this pattern continues then Case 3 and Case 4 could prove to be deeply controversial, especially if the case once again appears before the Pre-Trial Chamber and no supermajority is reached then the case will be forwarded to trial, possibly without the support of Cambodian judges.

The ECCC must walk a fine line in its relationship with the Cambodian government. It must maintain its independence whilst not antagonizing the government as this would create immense difficulties given the court's location and staff composition. So far, the ECCC's spokesperson's responses to government statements attempting interference have played an effective role in limiting the damage done. However, in moving forward, attempts must be made to prevent Hun Sen and other CPP leaders from demeaning the work of the ECCC. Donor governments can play a role by placing pressure on the Cambodian government to refrain from making such statements. Enhanced dialogue between court and government officials could also help to facilitate a more effective working relationship, although these should not be negotiations at which the ECCC's functions are compromised.



Near the Independence Monument, centre of Phnom Penh.

Conclusions

The core mandate of the ECCC is to put on trial senior leaders of the Khmer Rouge and to judge their guilt for a range of domestic and international crimes. This is a long and slow process, but so far it is being conducted professionally, efficiently, and has produced a trial that has met international standards of justice. These positive trends look set to continue as the court moves forward with more prosecutions. Given these achievements, further attention must now be paid to the more peripheral functions of the ECCC. Outreach and reform efforts should be stepped up and the problems of corruption and government interference need to be dealt with more effectively than they have in the past.

In identifying these weaknesses in the ECCC there should be caution not to express undue pessimism about the court. Original comments about the unlikelihood of a court ever being established, or suspects being arrested, proved to be misguided. Threats in 2007 to withdraw in response to bad human resources practices seem to be an overreaction in light of the 2008 report which praised the progress made at the court. Monitoring and constructive criticism from NGOs and experts play an important role, and these comments often result in positive changes at the ECCC, but portraying the court in a solely negative light will diminish its capacity to have an impact in Cambodia.

As well as playing an important role in trying leaders of the Khmer Rouge, the ECCC is also a significant step towards the implementation of the Responsibility to Protect. Its contribution to improving Cambodia's judiciary and the rule of law help strengthen Cambodia's ability to meet its obligations under Pillar One of R2P, the protection responsibilities of the state. The international community's involvement falls under Pillar Two of R2P as they are assisting Cambodia to build the necessary capacities to fulfil its responsibilities. The positive impacts of the ECCC will further the structural prevention capabilities of Cambodia and have direct relevance to the prevention goals of R2P.

Having said this, the importance of managing expectations about what the ECCC can achieve should be noted. As important as it is, and as much as programs can be put in place to increase its positive legacy, the ECCC is only a single, short-term institution. There was no expectation that the Nuremberg trials would single-handedly rebuild post-Second World War Germany, and no such expectation should be placed on the ECCC. It is a necessary but not sufficient step in Cambodia's long journey of recovery from the impacts of the Khmer Rouge.



10. References and Author Note

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